No. 10-510

In The
Supreme Court of the United States

ODIS L. TABOR,

Petitioner,

v.

FREIGHTLINER OF CLEVELAND, LLC,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the U.S. Court of Appeals for the Fourth Circuit correctly affirm the District Court's grant of summary judgment to the Respondent in this race discrimination case brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, where the undisputed evidence was that the Petitioner was terminated after an investigation showed that he threatened a co-worker with a knife and that there were no similarly situated employees who were treated more leniently?

RULE 29.6 DISCLOSURE STATEMENT

Respondent Daimler Trucks North America LLC, a limited liability company, is not a subsidiary of a publicly held company. The sole shareholder of its only member, Daimler North America Corporation, is Daimler AG, which is publicly traded in the Federal Republic of Germany.

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Urban Dictionary,
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STATEMENT OF THE CASE

Plaintiff/Petitioner Odis L. Tabor ("Tabor") instituted this action against Defendant/Respondent Freightliner Truck Plant Cleveland LLC[1] ("the Company"), alleging that he was terminated from his employment with the Company because he is "bi-racial," in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq*. ("Title VII"). The evidence showed that Tabor was terminated because of the Company's good-faith belief, after a thorough investigation, that Tabor had pulled a knife on a co-worker at a Union meeting. The U.S. District Court for the Middle District of North Carolina granted the Company's Motion for Summary Judgment, and the U.S. Court of Appeals for the Fourth Circuit affirmed. Tabor filed a timely Petition for Writ of Certiorari with this Court. As will be discussed in more detail below, there is no ground for this Court to grant Tabor's petition for writ of certiorari to review the Fourth Circuit decision.

Freightliner is a brand of Daimler Trucks North America LLC ("DTNA") – North America's leading manufacturer of medium and heavy-duty trucks that serve a wide range of commercial vehicle applications. DTNA has manufacturing plants in Mount Holly and Cleveland, North Carolina, among other locations. The hourly employees at the Cleveland facility are represented by the United Auto Workers Union, Local No. 3520. Tabor was

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[1] Since the Complaint was filed, Freightliner of Cleveland, LLC, has become part of Daimler Trucks North America LLC.

hired at the Cleveland facility on March 3, 2004, and was in that position until his discharge on February 5, 2007. At the times relevant to this action, Tabor was a shop steward for the third shift cab line employees at the Cleveland facility. Tabor has testified that he is bi-racial, that his mother is African-American, and that his father is Caucasian. The Company did not contest these factual assertions; however, it was undisputed that Tabor looks like he is African-American.

Tabor's termination was the climax of an ongoing conflict between Tabor and a co-worker named Jerry "Wayne" Lovell ("Lovell"), who is African-American[2]. Lovell has never been a member of management. Tabor testified that his first confrontation with Lovell took place in late September or early October 2006, when he and a supervisor, Johnny Jones ("Jones"), broke up an argument between Lovell and another employee. During that incident, Lovell allegedly told Tabor that he had no business being a Union representative.

1. The "Overtime Incident" of October 27, 2006

The next incident took place on October 27, 2006 ("the Overtime Incident"). Management had posted a request for three volunteers to work overtime, and the deadline to volunteer was 4:30 a.m. on a Wednesday. Approximately 4:30 a.m.

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[2] By discussing Tabor's conduct at work with respect to Lovell, the Company in no way means to condone the actual or alleged conduct of Lovell, which is discussed *infra*.

Friday, October 27, a lead person told Tabor that management wanted to talk to him. Tabor went to the area where the overtime sign-up sheet was posted, and met with Jones, Randy Wyatt ("Wyatt"), another supervisor, and Mike McGarrity ("McGarrity"), the second shift manager for the cab line. The managers showed him the sign-up sheet: four individuals had volunteered (including Tabor's girlfriend, whom he later married), but because only three were needed they wanted to consult with Tabor about whom to choose. Tabor gave his opinion about which three employees should be scheduled, including his girlfriend[3]. Meanwhile, Lovell approached, and said that he wanted to work overtime. Jones told Lovell that he had missed the deadline, and Lovell argued with him. According to Tabor, Wyatt and McGarrity left at this point and went over to a computer about 10 feet away. Jones then told Lovell that he would let Lovell work overtime if Tabor agreed to it. Tabor said no, and Lovell asked why not. Tabor replied, "What does the book say?" referring to the collective bargaining agreement. According to Tabor, he and Lovell argued for 10-15 minutes[4], the argument became increasingly heated, and Lovell allegedly called Tabor a "white man's nigger." Jones and Wyatt intervened, with Jones blocking Lovell and Wyatt

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[3] It does not appear that Tabor was wrong to have included his girlfriend in the overtime crew, but, as will be discussed below, the selection of Tabor's girlfriend was a large part of the reason for Lovell's perception that Tabor had been unfair.

[4] The Company believes Tabor's 10-15 minute time estimate is grossly exaggerated but has accepted it here solely for purposes of its Motion for Summary Judgment.

blocking Tabor. Lovell then threatened to "kick [Tabor's] ass" and told him to "step outside." Tabor admits that he replied to Lovell, "it's going to be between you and Jesus whether you live or die, because I'm going to drop you." Tabor also admitted telling Lovell, "You're going to have respiratory problems." McGarrity then joined the group and told the two employees to stop it. At Tabor's insistence, the group went to Human Resources.

The third shift Human Resources Assistant for the facility, Amanda Bilyeu, asked Tabor for a written statement regarding the incident, but Tabor refused, saying that he was too upset to provide a statement. Bilyeu then suspended Lovell and Tabor pending further investigation. Tabor admits that he calmed down within 12 hours of the incident and wrote a statement but did not give it to Bilyeu because he was suspended. He admits that he did not provide a written statement to the Company until after his suspension had been completed.

Bilyeu was able to obtain statements from Lovell, McGarrity, Wyatt, and Jones. Lovell denied saying "nigger," and neither McGarrity, Wyatt, nor Jones reported having heard any such thing. McGarrity said that he had left the discussion about overtime shortly after Lovell came over and did not hear what was taking place until the argument seemed to become very heated. Lovell's statement indicates that he felt that Tabor was showing favoritism to his girlfriend, and he admits that he did accuse Tabor of behaving differently when he was around "white management." (In other words, Lovell essentially said that he had accused Tabor of

being an "Uncle Tom" for always siding with "white" management, and was not attacking him for being bi-racial. Indeed, in this regard Lovell appears to have been treating Tabor as if he were African-American.)

More importantly, Lovell's statement also indicates that Tabor had threatened to kill him. (As discussed above, Tabor admitted that he made such threats.)

In the end, Lovell was suspended for five days because he provided a written statement and agreed not to challenge the discipline. The same offer was made to Tabor, but he refused it, so he was suspended for ten days. Both men were directed to attend anger management classes.[5] Tabor grieved his discipline, and meanwhile Lovell filed charges against Tabor with the Union, seeking to have him removed as shop steward.

2. The "Huddle Meeting Incident" of January 5, 2007

Team leaders at the Cleveland facility held daily "huddle meetings" with their employees. As a Union representative, Tabor was sometimes allowed to speak in huddle meetings about Union- and employment-related matters. On January 5, 2007, Tabor was speaking at a "huddle meeting." Lovell arrived approximately five minutes late, and according to Tabor's deposition testimony said,

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[5] This was Tabor's second referral for anger management. He had a similar mandatory referral in July 2005.

"[Tabor] ain't shit, don't listen to what he got to say. He ain't going to be no damn Union rep; he going to be taken care of, and you all crazy as hell for listening to him. You all let him call you all stupid and ignorant. He hang with the white boys." Tabor did not respond to Lovell but reported the incident to Jones, who told him to report it to Human Resources. Bilyeu investigated the incident and, although the witnesses said that Lovell was to blame, most of them had heard him say only, "don't listen to what [Tabor] got to say." One or two witnesses heard him say that Tabor would not be their Union representative much longer, and only one witness heard him say something to the effect of "crazy as damn hell." Based on the witnesses' statements that she received at the time, Bilyeu and Lynn Thayer ("Thayer"), who at the time was Manager of Personnel and Administration, in consultation with Human Resources Manager Rich Klinedinst ("Klinedinst"), concluded that Lovell's behavior was inappropriate but did not rise to a level that required formal discipline. Bilyeu and Thayer counseled Lovell about his behavior and reminded him that Tabor was his Union representative and had been authorized by the team leader to speak at the meeting. Lovell was verbally counselled about his conduct while Tabor was not counseled or reprimanded in any way.

3. The "Knife Incident" of January 13, 2007

The termination event occurred on the following Saturday, January 13, 2007. The Union had scheduled a meeting for that day, at the auditorium of West Rowan High School, which was

to include the selection of jurors for the hearing on Lovell's charges against Tabor. Many Union members who attended were accompanied by their children. The Union officials were sitting on a stage at a table facing the audience section of the auditorium. The sergeant at arms, Todd Scott, was seated in the back, near the door. According to Tabor's deposition testimony, Lovell spoke and then sat down in the audience. Tabor then began talking, and said that Lovell had called him a "white man's nigger." At that point, Lovell got up from his seat and began walking down the aisle toward the stage. When Lovell got within about three feet of Tabor, Tabor turned toward Lovell with what appeared to be one or two knives in his hands. Someone shouted, "He's got a knife!," and the room erupted and the meeting abruptly ended.

The next work day after the incident was Sunday night, January 14, 2007. As Bilyeu was driving to work, she received a call from Robert Whiteside ("Whiteside"), the chief shop steward, who reported that there had been an "incident" the previous day. When she arrived at work, Whiteside and Lovell were waiting to see her, along with co-worker Tara Hendrix ("Hendrix") Whiteside, Lovell, and Hendrix told Bilyeu that Tabor had pulled a knife on Lovell during the Union meeting and reported that co-workers were afraid of Tabor. Bilyeu sent Lovell to a separate office for safety and excused Hendrix. Then Bilyeu called in Tabor, who was already at work, and Steve Barber ("Barber"), a Union representative. In Bilyeu's presence, Whiteside told Tabor that he was no longer a Union representative, and he and Tabor discussed some

other Union "housekeeping" matters. To Bilyeu, Tabor appeared to be very agitated, and she determined that the safest course was to get Tabor out of the workplace. She suspended Tabor pending investigation. At some point during the discussions on the night of January 14, Barber claimed that the knife was actually made of rubber.

Once Lovell[6] and Tabor were suspended, Bilyeu conducted her investigation. She obtained statements from a number of employees, all of which were relatively consistent. In summary, the employee witnesses said that Tabor had been speaking to the Union officials and said that Lovell had called him a "white man's nigger." The audience became upset at this remark, and Lovell, who was sitting a few rows behind Tabor, came into the aisle raising one or both hands so that he could be recognized to speak. None of the witnesses said that that Lovell appeared to be threatening Tabor in any way, but only that he seemed to be trying to get the officials' attention. Most of the witnesses specifically denied that Lovell had done anything inappropriate or threatening. However, when Lovell approached the front of the auditorium where Tabor was, the witnesses said that Tabor turned around and had either one knife, or two knives. Two witnesses said that the knives were shiny, indicating that they were real and not rubber. They said that the sergeant at arms tried to get the knives away from Tabor but that Tabor refused to give them up. A group of men

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[6] The Company reiterates that *Lovell* was suspended as well as Tabor. Lovell was ultimately reinstated because he was determined not to be at fault.

removed Tabor from the building, and another group removed Lovell.

Bilyeu also spoke with Deputy Sheriff Charles Beeker of the Rowan County Sheriff's Department, who had arrested Tabor after the incident and charged him with possession of a weapon on school grounds. Beeker said that he had been called to the scene after the January 13 meeting but that Tabor and Lovell were already gone when he arrived. However, the Union members still at the scene told him that Tabor had had a knife. Beeker told Bilyeu that when he arrested Tabor, Tabor had told him that the knife was plastic and that Tabor had only been "trying to put fear in" Lovell.

Bilyeu presented the information gathered to Klinedinst, who made the decision to terminate Tabor's employment based on his threat to Lovell on October 27, 2006, and the overwhelming evidence that he had pulled a knife or knives at the January 13, 2007, Union meeting.

Tabor claimed that the knife was a toy, but he admitted that (1) several people at the meeting saw him with what *they* thought was a knife; (2) someone yelled, "He got [sic] a knife!"; and (3) Tabor never put the "toy" knife away after pulling it out of his pocket. Moreover, he admitted that the "blade" was dark gray and that the "toy" knife had a hilt, like a real knife.

Tabor made a number of contentions in support of his claim of race discrimination: (1) Caucasian and African-American employees have

been in fights at work and have not been terminated; (2) the employees who gave statements against him in connection with the Union meeting on January 13, 2007, were biased against him because he applied the rules uniformly without regard to race; (3) the Company had no business taking action against Tabor based on conduct he engaged in off-duty and off-premises, and actually committed an unfair labor practice by basing its action on his alleged conduct during a Union meeting; and (4) the Company had no business taking action against Tabor because he was ultimately acquitted of the charge of possession of a weapon on school property. The District Court and the Court of Appeals properly rejected these contentions.

Similarly situated employees. The Company's evidence showed the following: Tabor's (and Lovell's) conduct in connection with the "Overtime Incident" of October 27, 2006, would be considered a "verbal threat." Nine employees were disciplined for making verbal threats during 2006 and 2007: One bi-racial (Tabor), three African-American (Lovell and two others), and five white. Four were suspended for three days (2 black, 2 white), four were suspended for five days (1 black (Lovell), 3 white), and one – Tabor – was suspended for 10 days because he refused to cooperate with the Company's investigation and rejected the Company's offer of a five-day, unprotested suspension.

Each of the other eight employees disciplined for making verbal threats had accepted their penalties unprotested. The reasons for Tabor's lengthier suspension for verbally threatening to kill

Lovell in the Overtime Incident was his own refusal to cooperate with management in the investigation of the incident and his unwillingness to accept the five-day unprotested suspension offered by the Company.

Regarding the "Knife Incident" of January 13, 2007, there was only one employee besides Tabor who had been accused of getting into a fight off-premises. That employee was African-American, and she – like Tabor – was discharged. This former co-worker is the only employee who is truly "similarly situated" to Tabor.

In his summary judgment response, Tabor presented evidence regarding several other employees who engaged in various behaviors and who received various penalties, or no penalties, for their conduct. Some of the employees were not disclosed in the Plaintiff's Answers to Defendant's First Set of Interrogatories or mentioned in only the vaguest terms. The others were either not comparable – for example, several were terminated but reinstated pursuant to contract negotiations with the Union; some were not accused of violent conduct, as was Tabor; some were accused of violent conduct but not use of weapons, unlike Tabor; some were accused of violent conduct that the Company was unable to verify, unlike Tabor. Tabor also cited the employee who, like Tabor, was terminated for off-duty violent conduct toward a co-worker and was never reinstated. These employees' situations did not create a fact issue of disparate treatment.

Alleged bias of hourly, bargaining-unit employees. Apart from the "white man's nigger" comment allegedly made by Lovell, Tabor has presented no evidence apart from his own uncorroborated testimony that any of the 10 other employees who provided statements to Bilyeu in connection with the knife incident were biased against him because he was bi-racial. Therefore, his claim of "bi-racial discrimination" as it relates to these statements has no merit. Even if the employees were all biased against him because he enforced the collective bargaining agreement without regard to race, he was unable to contradict Bilyeu's testimony that she had no reason to believe that the employees who provided statements were on an alleged personal vendetta against Tabor. Indeed, the fact that, on prior occasions, several of the same employees who had provided statements against him in connection with the knife incident had *defended* Tabor on earlier occasions.

In any event, Tabor failed to present any evidence that the comments allegedly made by his co-workers were directed at him because of his bi-racial status. Indeed, Tabor contended (without any evidentiary support) that "he was fired because he insisted on treating people fairly without regard to race in his position of union steward." This is not even remotely a "bi-racial discrimination" issue.

To the extent that his co-workers did not like Tabor, and to the extent that their alleged animus was not a natural consequence of his own behavior, Tabor offered no evidence that would create a fact issue that their alleged animus was based on his bi-

racial status. "White man's nigger" and "house nigger" are primarily intra-racial epithets directed by African-Americans to African-Americans. *See, e.g., Urban Dictionary*[7] (defining "house nigger" as "[a] black person that does their best to please white people even if it means disowning their own racial identity"); *Wikipedia*[8] ("**Uncle Tom** is a pejorative for a black person who is perceived by others as behaving in a subservient manner to White American authority figures, or as seeking ingratiation with them by way of unnecessary accommodation.") Thus, assuming for the sake of argument that employees called Tabor these names, their doing so demonstrates only that they perceived him as African-American.

Employer responsibility for off-duty, off-premises conduct. It is undisputed that the Knife Incident involved an ongoing dispute between two Cleveland facility employees and that many, if not most, of those attending the meeting were employees of the facility. Therefore, the Company undoubtedly had a legitimate interest in becoming involved in the issue: the continuing conflict between Tabor and Lovell was almost certain to spill back into the plant.

Tabor's acquittal of criminal charges in connection with the knife incident. Here, Tabor is comparing apples with oranges. The burden of proof for the prosecution in a criminal case is "guilty

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[7] http://www.urbandictionary.com/define.php?term=house+nigger. Urban Dictionary definitions are submitted by readers.

[8] http://en.wikipedia.org/wiki/Uncle_Tom. (Bold-faced text in original.) Wikipedia information is also submitted by readers.

beyond a reasonable doubt." However, in a civil lawsuit for discrimination, the employee bears the burden of proof, and the only issue is whether the employer honestly believed that the employee engaged in conduct warranting discharge. In any event, Tabor was not acquitted of criminal charges until April 2007, approximately three months after his termination.

SUMMARY OF THE ARGUMENT

The district court's grant of summary judgment, and its affirmance by the Court of Appeals, were entirely proper: that threatening a co-worker with a knife is a legitimate ground for discharge should go without saying.

Tabor presented no evidence, direct or circumstantial, that his termination was motivated by biracial animus. The racial comments allegedly made by his co-workers are not attributable to management, and they were also comments typically directed by African-Americans at African-Americans – in other words, Tabor's evidence shows that his African-American co-workers perceived him as African-American. He had no evidence that management – whether it knew of his "biracial" status or not – made any racial comments, took action against him because he was biracial, or allowed his biracial status to play even a limited role among other causes. Tabor's contention that some management "knew" he was biracial fell far short of creating a genuine issue of material fact that he was discharged *because* he was biracial.

Nor did Tabor's evidence of allegedly "similarly situated" co-workers create a genuine issue of material fact. Among his co-workers, the only one who was truly "similarly situated" to him was African-American, and she was treated exactly the same way he was. Employees who received lesser penalties because they accepted the penalties as settlement of their grievances, or because they committed lesser offenses than Tabor, are not similarly situated to Tabor.

The critical undisputed fact here is that Tabor was terminated because of The Company's honest, good-faith belief, after a thorough investigation, that he threatened a co-worker with a knife. Employee violence (including threats of violence) is clearly a legitimate, non-discriminatory reason for discharge, and Tabor had no evidence that the Company's action was pretextual. Tabor's argument that it was an "unfair labor practice" for the Company to terminate him for threatening violence and brandishing a weapon at a Union meeting is completely without merit. However, even if it were true, it would not help Tabor because the relevant question is whether the Company was motivated by Tabor's *race*. If the Company had any other motivation, then Tabor's "biracial discrimination" claim rightly failed.

In addition to the utter lack of merit of Tabor's case, his Petition for Writ of Certiorari fails to meet the exacting requirements of this Court:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. . . . A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Rule 10, Rules of the Supreme Court of the United States. The instant Petition should be denied because (1) the Court of Appeals decision does not conflict with a decision from any other U.S. Court of Appeals or with a decision from the North Carolina Supreme Court; (2) the Court of Appeals has not "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power"; (3) the case does not involve "an important question of federal law that has not been, but should be, settled by this Court,"; and (4) the Court of Appeals decision does not conflict "with relevant decisions of this Court." *See id.*, Rule 10(a) and (c)[9].

[9] Rule 10(b) applies only to decisions from state courts.

REASONS FOR DENYING THE PETITION

I. PETITIONER'S CLAIMS SHOULD NOT HAVE BEEN SUBMITTED TO A JURY BECAUSE HE PRESENTED NO EVIDENCE THAT THE LEGITIMATE, NON-DISCRIMINATORY REASONS OFFERED BY THE RESPONDENT WERE FALSE.

Tabor's contention that the Court of Appeals decision conflicted with this Court's precedent is wrong. Because Tabor has no evidence that the Company's reasons for terminating him were a pretext for "biracial discrimination," it does not avail him to cite *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000), in which this Court found that the issue of pretext should have been submitted to a jury because there was evidence showing that the employer's legitimate, nondiscriminatory reasons for the plaintiff's termination were false. Apart from his own speculation, Tabor submitted no such evidence.

Pulling a knife on a co-worker is a legitimate ground for termination; indeed, courts hold that merely threatening a co-worker is. *See, e.g., Worster v. U.S. Postal Service*, 132 F. Supp. 2d 397 (M.D.N.C. 2001) (verbal death threats), *aff'd*, 28 Fed. Appx. 324 (4th Cir. 2002) (unpub.); *Owens v. City of Durham*, 2002 WL 750868 (M.D.N.C. 2002) (threatening behavior); *Morris v. Bellsouth Telecommunications, Inc.*, 302 F. Supp. 2d 515 (M.D.N.C. 2004) (plaintiff's saying she was suicidal and homicidal). *Cf. Thacker v. Brady Services, Inc.*, 367 F. Supp. 2d 882 (M.D.N.C. 2005) (for summary judgment purposes,

assuming plaintiff pushed co-worker), *aff'd*, 144 Fed. Appx. 328 (4th Cir. 2005) (unpub.).

Moreover, the fact that Tabor may claim that he was "provoked" by Lovell does not render his termination for threatening behavior discriminatory. *See, e.g., Worster* (leading up to threat, plaintiff was arguably harassed by Union members for her non-Union views); *Owens* (before threat against co-worker, plaintiff had arguably been harassed by him).

Moreover, even if, instead of one or two shiny knives, Tabor had a toy knife, this would change nothing. By his own description, the "toy" knife resembled a real knife, and he was using it in a tense situation, indicating that there was no reason for anyone to believe that Tabor was joking or engaging in horseplay. Indeed, the Sheriff's Department reported that Tabor had said he deliberately used the knife to "put a scare into" Lovell.

The U.S. Courts of Appeal have held that the threatening use of a toy weapon can result in a criminal conviction, a much greater burden to satisfy than providing a legitimate, non-discriminatory reason for discharge. *See, e.g., U.S. v. Martinez-Jiminez*, 864 F.2d 664 (9th Cir.), *cert. denied*, 489 U.S. 1099, 109 S. Ct. 1576, 103 L. Ed. 2d 942 (1989) (non-assaultive use of toy gun in bank robbery was "dangerous weapon" within meaning of federal bank robbery statute and could form basis for criminal conviction of armed bank robbery). *See also U.S. v. Medved*, 905 F.2d 935, 939-40 (6th Cir. 1990), *cert.*

denied, 498 U.S. 1101, 111 S. Ct. 997, 112 L. Ed. 2d 1080 (1991) (following *Martinez-Jiminez* in context of armed bank robbery).

Tabor further contends that the Court of Appeals erred by failing to consider that, because his alleged misconduct occurred off-duty and off-premises, the employer had no business interfering. This contention is also wrong. An employer is often responsible, and may face legal liability, for employee misconduct that occurs off premises and during the employee's off-duty hours – particularly when that misconduct involves a co-worker. *See, e.g.*, *Ferris v. Delta Air Lines, Inc.*, 277 F.3d 128 (2d Cir. 2001) (rape of plaintiff by co-worker in co-worker's hotel room during flight layover while both were off duty), *cert. denied*, 537 U.S. 824, 123 S. Ct. 110, 154 L. Ed. 2d 34 (2002); *Magraff v. Lowes HIW, Inc.*, 2005 WL 2293648 (D. Colo. 2005) (rape of plaintiff by co-worker during off-site private party, while both were off duty). *Cf. Thaeter v. Palm Beach County Sheriff's Office*, 449 F.3d 1342 (11th Cir. 2006) (where sheriff's deputies had agreed not to engage in conduct that reflected poorly on department, held that termination of deputies for "acting" for compensation in pornographic video material displayed on internet was legitimate ground for discharge, notwithstanding that activity was engaged in off-duty and off-premises).

Tabor's "unfair labor practice" argument completely lacks merit. He cites no authority for his amazing proposition that it would be illegal "interference" for an employer to discharge an employee for threatening the life of a co-worker (and

fellow member of the bargaining unit) at a Union meeting. He ignores pertinent language from the case he primarily relies upon: *Crown Central Petroleum Corp. v. NLRB*, 430 F.2d 724 (5th Cir. 1970). In finding that it was improper for an employer to terminate a Union employee for accusing management of "lying" during a labor-management grievance meeting, the court said, "*As long as the activities engaged in are lawful* . . . the employees are protected . . .." 430 F.2d at 731 (emphasis added). Moreover, unlawful interference under Section 8(a)(1) of the National Labor Relations Act ("NLRA") must be reasonably coercive or intimidating to employees, *see, e.g., NLRB v. Grand Canyon Mining Co.*, 116 F.3d 1039, 1044 (4th Cir. 1997). In this case, co-workers were intimidated, not by the Company but rather by Tabor himself. Under Section 8(a)(3) of the NLRA, the employer must be motivated by anti-union animus, *see, e.g., Wright Line*, 251 NLRB 1083 (1980), *enf'd*, 662 F.2d 899 (1st Cir. 1981). There is no evidence whatsoever that the Company has animus against the Union; indeed, Tabor's adversaries and victims were members of the same bargaining unit. Section 8(a)(2) of the NLRA prohibits "employer dominance or interference with the formation or administration of any labor organization" and was aimed at prohibiting "company unions." *See, e.g., NLRB v. Pennsylvania Greyhound Lines*, 303 U.S. 261, 266, 58 S. Ct. 571, 574, 82 L. Ed. 2d 831 (1938). There is no possible interpretation of the undisputed facts in this case that would lead to a finding that the Company was trying to "dominate" or "interfere with" the Union. Nor is there any basis for Tabor to contend that the NLRA somehow "protects" his "right" to threaten a

co-worker with a knife – real or fake – as long as he does it under cover of a Union meeting.

Finally, even if the Company *had* interfered with, dominated, or discriminated against Tabor because of his exercise of NLRA rights, this would not make the Company's (hypothetical) conduct a pretext for bi-racial discrimination – rather, it would undercut Tabor's claim that he was discriminated against because of his race. There would still have to be some reason for a trier of fact to believe that Tabor's race was the true motivation for the allegedly unlawful conduct.

Finally, because the burdens of proof in criminal prosecutions and civil actions for employment discrimination are so different, the fact that Tabor was acquitted of criminal charges is completely irrelevant to his discrimination case. As will be discussed below, the relevant inquiry for discrimination purposes is whether the employer had an honest belief that the employee engaged in the misconduct, not whether the employee was "guilty beyond a reasonable doubt."

II. PETITIONER WAS UNABLE TO CALL INTO QUESTION RESPONDENT'S GOOD-FAITH BELIEF THAT PETITIONER HAD ENGAGED IN MISCONDUCT WARRANTING DISCHARGE.

Although the employer in a discrimination case has the burden to articulate a legitimate non-discriminatory reason for the action taken, the burden of proof remains with the plaintiff at all

times. *See generally McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-07, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993).

Tabor makes much of the fact that he was acquitted of criminal charges in connection with the "toy" knife, as if that were dispositive on the discrimination issue. In fact, it is not: in a discrimination case, the employer can be flat wrong so long as it acted based on an honest belief that the employee engaged in misconduct that would result in termination. *See, e.g., Hawkins, supra*, 203 F.3d at 279 (4th Cir. 2000), *quoting DeJarnette v. Corning, Inc.*, 133 F.3d 293, 299 (4th Cir. 1998) ("when an employer gives a legitimate, non-discriminatory reason for discharging the plaintiff, it is not our province to decide whether the reason was wise, fair, or even correct, ultimately, so long as it truly was the reason for the plaintiff's termination"); *Thacker, supra*, 367 F. Supp. 2d at 890 (quoting same passage from *Hawkins*). The other circuits agree. *See, e.g., Fuentes v. Perskie*, 32 F.3d 759, 765 (3d Cir. 1994) ("To discredit the employer's proffered reason . . . the plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent"); *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991) (in age discrimination case, it did not matter if witnesses accusing plaintiff of sexual harassment

were "lying through their teeth"; relevant inquiry is whether employer terminated plaintiff based on belief that plaintiff had sexually harassed and retaliated against employees).

The courts do not sit as "super-personnel departments," second-guessing employers' decisions. *See, e.g., DeJarnette, supra,* at 298-99. Again, the other circuit courts of appeal agree with the Fourth Circuit. *See, e.g., Mechnig v. Sears, Roebuck & Co.*, 864 F.2d 1359, 1365 (7th Cir. 1988).

The foregoing principles apply all the more in this case, where Tabor admitted that he had deliberately set out, at the very least, to create the impression that he had engaged in the misconduct at issue (that is, that he pulled what appeared to be a deadly weapon on a co-worker with the intent of intimidating him).

Finally, as stated above, every Cleveland facility employee who was alleged to have engaged in conduct somewhat similar to Tabor's in the Overtime Incident (making a verbal threat) agreed to an unprotested suspension. These employees are not similarly situated to Tabor and therefore cannot provide support for his "bi-racial discrimination" claim. *Cf., e.g., Hearne v. United Parcel Service, Inc.*, 2007 WL 3287758 at *13 (E.D.N.C. 2007) (reinstatement of employees during grievance process is not evidence of disparate treatment of plaintiff because, with respect to former, employer's decision is not voluntary).

With respect to the Knife Incident, there was only one remotely similarly situated employee: an African-American who allegedly got into a fight with a co-worker off-premises and off-duty. This employee – like Tabor – was also terminated; thus, her discharge cannot provide circumstantial evidence of discrimination.

CONCLUSION AND RELIEF SOUGHT

For all of the reasons set forth above, the Respondent submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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